IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 27731 of 2007
With
SPECIAL CIVIL APPLICATION No. 27732 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE H.K.RATHOD **Sd/-**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **YES**

2 To be referred to the Reporter or not ? **YES**

3 Whether their Lordships wish to see the fair copy of the judgment ? **YES**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **NO**

5 Whether it is to be circulated to the civil judge ? **NO**

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DEPUTY EXECUTIVE ENGINEER - Petitioner(s)
Versus
RAJ AMARSINH FULSINH - Respondent(s)

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Appearance :
MS SEJAL K MANDAVIA for Petitioner(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 13/12/2007

ORAL JUDGMENT

1. Heard learned advocate Ms. Sejal K. Mandavia appearing on behalf of petitioner in both the matters.

2. The draft amendment is placed on record in both the matters explaining the delay in filing both the petitions challenging the awards in question.

3. Accordingly, draft amendment is allowed with a direction to the petitioner to carry out the same within a period of two week from today. Accordingly, delay in filing both the petitions are condoned int the interest of justice.

4. It is necessary to note that in Special Civil Application No.27731 of 2007, the award passed by Labour Court, Bharuch in Reference (LCB) No.470 of 1990 dated 21st September 2003 is challenged by petitioner being a State Authority after a period of four years. In Special Civil Application No.27731 of 2007, the name of respondent - workman is Raj Amarsinh Fulsinh. In Special Civil Application No.27732 of 2007, the name of respondent - workman is Manilal Ratanji Vasava, where, Labour Court has decided the Reference (LCB) No.270 of 1994 dated 15th May 1994, where, State Authority has taken time to challenge the award after a period of three years. Therefore, just to give identity to both the matters so, confusion may not arise, I refer these both matters in the name of workmen.

5. The Labour Court, Bharuch in both the cases, Shri Raj and Shri Manilal granted reinstatement with continuity of service with 15% backwages of interim period.

6. The contention raised by learned advocate Ms. Mandavia is that both the workmen were appointed periodically as a work-charge clerk and on each occasions, after completion of period, a separate application was given by workmen and on separate application, a fresh order was issued by petitioner for prescribing a specific period and on each occasions, such periodical orders have been issued by petitioner in favour of respondents giving a date of termination. At the end of termination of service in case of Shri Raj is 17th February 1987 and in case of Manilal is 20th July 1987. The contention raised by learned advocate Ms. Mandavia is that in both the occasions, no such application was given by both the respondents workmen to issue fresh order and therefore, their services come to end automatically. Therefore, compliance of Section 25F is not necessary, because such kind of appointment based on periodical duration is not covered by definition of 'retrenchment' of Section 2(oo) of the Industrial Disputes Act, 1947, but, such appointments are covered by exception of Section 2(oo)(bb) by the Industrial Disputes Act, 1947. In short, her submission is that such termination is not a retrenchment and therefore, Section 25F is not to be followed by petitioner. But, Labour Court has come to contrary decision from the records and granted the reinstatement in favour of respondents with 15% backwages of interim period. She read the relevant observations made by Labour Court and she also read

the certain decisions which have been considered by Labour Court. There is no dispute by petitioner that on each occasions, a periodical orders were issued. Only one or two days breaks were given in between and thereafter, another order on the same terms and conditions was issued by petitioner. Such contingency remained continue on each occasions till no fresh application is given by the workmen and therefore, their services come to end automatically. She also submitted that there was no artificial break in between two appointment orders. She also submitted that Labour Court has committed gross error in granting such relief by coming to conclusion that Section 25F is violated. She relied upon the following decisions :

(i) 2000(2) GLR 1793 (Purshottambhai R. Kachhadia v. State of Gujarat and Ors)

(ii) 2007(1) SCC 533 (Gangadhar Pillai v. Siemens Ltd.)

(iii) 2006(2) SCC 794 (Haryana State Argicultural Marketing Board v. Subhash Chand and Another)

(iv) (2005) 8 SCC 481 (Batala Coop. Sugar Mills Ltd. v. Sowaran Singh)

(v) 2002(4) GLR 2940 (Balubhai G. Makwana v. State of Gujarat & Ors.)

7. This Court has perused one sample of order issued by petitioner in favour of respondents. In the appointment order, the reason is given for appointment which was on administrative interest on work charge establishment in regular pay-scale and dearness allowance is also granted, where, the period is specified from the date to 29 days at beyond office appointment is given and after reporting by workmen, he should have to follow the condition which were incorporated in appointment order.

8. Learned advocate Ms. Mandavia placed the orders for perusal of this Court of both the workmen – Shri Raj and Shri Manilal, has made available the conditions incorporation in appointment order and I have read it and have considered the conditions as well as the wordings of the appointment order. Learned advocate Ms. Mandavia submitted that in both the cases, some appointments are of 89 days and some appointments are of 29 days.

9. I have considered the submissions made by learned advocate Ms. Mandavia. It is necessary to note the date of first appointment of both the workmen. In case of Shri Manilal, his appointment is dated 10th February 1982 and termination is 17th February 1987. Similarly, in case of Shri Raj, his appointment is also dated 10th February 1982 and termination is also dated 17th February 1987.

10. Learned advocate Ms. Mandavia submitted that

these two workmen were appointed without following the legal procedure of recruitment and not from employment exchange and not selected by way of selection procedure and they were appointed by back door entry and therefore, they are not entitled the benefit of Section 25F of the Industrial Disputes Act, 1947.

11. I have also considered the submissions made by learned advocate Ms. Mandavia and I have also considered the relevant decisions which have been relied upon by learned advocate Ms. Mandavia. The law decided by Apex Court in respective decisions, there is no dispute about ratio decided by Apex Court, but, each decision is applicable to the facts of each case. Ratio is to be applied after examining the facts of each case. If little facts are different, ratio will not apply to the facts of the present case. The main controversy in these two petitions is periodical appointment, artificial break of two or three days and their services come to end which covered by definition of exception of Section 2(oo) (bb) or not and therefore, it does not amount to retrenchment and non-compliance of Section 25F is not rendered the termination *ab initio void or not.*

12. Section 2(oo) of the Industrial Disputes Act, 1947 is quoted as under :

> *"**Section 2(oo) – "Retrenchment"** means the termination by the employer of the service of*

a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include -

(a) xxx xxx xxx

(b) xxx xxx xxx

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) xxx xxx xxx"

13. Section 25-F of the Industrial Disputes Act, 1947 is also quoted as under :

"Section 25F – Conditions precedent to retrenchment of workmen : *No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until -*

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which

shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette.]"

14. It is necessary to note that in Section 2(oo) - 'retrenchment', amendment in the Act came into force w.e.f. 18th August 1984. Before 18th August 1984, there was no birth taken place by Section 2(oo)(bb). Therefore, an appointment which was prior to the birth of Section 2(oo)(bb), naturally, Section 2(oo)(bb) will not apply, because, in both the cases, both the respondents workmen were appointed prior to 1984 and Section 2(oo)(bb) is not having retrospective effect, because, it is not a procedural amendment, but, it is a substantive amendment in the Act giving a right to the employer and other way loosing the right by the workman. This aspect has been considered by the Division Bench of this Court in case of ***Bharat Heavy Electricals Ltd. v. R.V. Krishnarao*** reported in ***1989(2) GLH 1*** and held in Head Note (A) which is quoted as under :

"Head Note (A) : Industrial Disputes Act, 1947 – Clause (bb) of S.2(oo) – Provision is not retrospective in nature : *In view of this constant trend of decisions of the Supreme*

Court, interpreting the then existing provisions of the term 'retrenchment' as found in S.2(oo) the legislature intervened by enacting further exclusion clause, in shape of clause (bb). It, therefore, becomes obvious that the legislature wanted to remedy the difficulty which was found in the then existing exclusion clauses (a), (b) and (c) in S.2(oo), and that is precisely the reason why a substantive provision excluding from the operation of term 'retrenchment', those actions which were covered by clause(bb) was enacted. It is obvious that the legislature while enacting the said provision has not expressly made it retrospective. (Para 6)"

14.1 Therefore, if appointments were made prior to 18th August 1984, amended in Section 2(oo)(bb) is not applicable. The respondent was appointed prior to 18th August 1984 i.e. in the year of 1982 and remained in service upto 1987 by periodical orders, so, there was a continuation, in between, a right which has been already accrued in favour of workmen from the date of appointment, that cannot be curtailed at the end of services. Therefore, date of termination is not to be taken into account, but, date of appointment is relevant, when workman is appointed by periodical appointment, at that occasion, there was no such scope to consider such kind of appointment outside the scope of retrenchment.

15. Apart from that, if it is taken into account

that Section 2(oo)(bb) is applicable, then, there is an object behind it. The statutory provision is not amended without any purpose and without any necessity. The purpose behind the appointment is that if project appointment, requirement of the institution, necessity, a time schedule work, over load work or to meet the immediate contingency by the institution, such kind of appointment is necessary, and therefore, for short period, just to mitigate the hardship to the employer to complete the work of project or some activities is to be complete within some specific time, then, such kind of periodical order is necessary. Otherwise, method of giving a nature of regular appointment, merely specified 29 days in the order, regular scale is given, dearness allowance is given and all the conditions incorporated in the appointment order as if that he was a regular employee appointed by petitioner. So, the substance of the appointment order is a regular appointment order as a work charge employee, not merely a periodical order for specific duration.

16. Let us consider the submissions made by learned advocate Ms. Mandavia that periodical orders were there and accepted by the workmen without any dimmur, now, he cannot raise contention, but, I failed to understand the submissions made by learned advocate Ms. Mandavia that what was the justification for the petitioner being a statutory authority to issue such kind of order in favour of respondents. Merely, issuing periodical order is not enough for

the employer, but, they should have to justify such kind of periodical order before the Court and then, they are entitled the benefit of exception, otherwise not. Before the Labour Court, petitioner remained silent about justification for issuing such kind of orders to the respondents. What was the compelling circumstances to issue such kind of orders denying the legitimate and legal right to the workmen, for which, he is entitled at least for a minimum protection under Section 25F of the Industrial Disputes Act, 1947. So, before the Labour Court, both the workmen remained in service about more than five years continuously, except these two or three days, an artificial break and on each occasions, a fresh order on the same terms and conditions without any justification. Even in the order, no reason is given that particular appointment is given because to fulfill such kind of work. In the appointment order, the reason is due to administrative interest, such kind of order is issued by the petitioner. So, merely, giving artificial break and making a show that on each occasion, applications were given by workmen and therefore, order of appointment is issued in favour of workmen. Therefore, it is a renewal of contract and therefore, covered by exception. Such contention cannot be accepted by this Court, otherwise, it amounts to give a permission to the employer to abuse the provisions of Section 2(oo)(bb) by giving such kind of order without requirement and without necessity. Such order of appointment should not have to be used by unscrupulously by the

employer, so, they deny a legitimate legal right to the workmen. It is not the case of petitioner that work is not available after terminating the services of respondents. If workmen remained in service about 5 years, then, all of sudden, their period was not extended without any reasons and justification. The work was available even though service was not extended then it amounts to unfair labour practice and arbitrary. No where in pleadings or in evidence, petitioner has raised contentions that period of appointment order not extended as work is over, no work is available. This Court has gone through the decisions which have been relied upon by learned advocate Ms. Mandavia and this Court has perused the same. But, on each decision, a periodical appointment is meant for either in project, either for particular work, either casual labour or either for particular kind of requirement, but, in none of the decision, such kind of appointment orders were discussed by the Apex Court as well as this Court. The Apex Court has specifically made clear that a workman engaged on casual basis on daily wages for specific work and for specific period, then, termination is not retrenchment. Here, specific period is there, but, specific work is not mentioned which is necessary to be established by petitioner before the Labour Court.

17. Therefore, according to my opinion, the petitioner shall have to justify such kind of appointment or they should have to point out the compelling circumstances require such kind of

appointment, otherwise, such kind of appointment is nothing else just to deny the legal rights of the workmen concerned or to frustrate the object of definition of retrenchment.

18. This Court has recently examined this issue in ***Special Civil Application No.21037 of 2006 dated 28th November 2007*** in case of ***Gujarat Agro Industries Corporation Limited v. Pravinsinh Babubhai Chauhan*** (Coram : *H.K. Rathod, J.*). The whole issue has been examined by this Court at length and therefore, same issue may not be repeated again here.

19. In the aforesaid decision, the period of service from 1991 to 1994 is considered. The case which I have decided where similar type of orders were issued by petitioner Gujarat Agro Industries Corporation Limited (Supra) and same question has been examined by this Court in detail even considering the recent decision on the subject i.e. Section 2(oo)(bb) of Apex Court. Therefore, the relevant observations made by this Court in Para 9 to 13 are quoted as under :

> 9. Findings given by the labour court are based on legal evidence and labour court has given cogent reasons in support of its conclusions. Looking to the appointment order, why such type of appointment orders were issued periodically and on temporary basis, for that, there is no justification

coming forward from the side of the petitioner. If the requirement is continuing from the date of appointment till the date of termination, then, why management is issuing such orders on periodical basis, on temporary basis. Reason is apparent that this is done only with a view to get rid of the mandatory provisions of section 25F of the ID Act, 1947 and to deprive the workman from claiming protection of the said mandatory provisions. Such type of efforts on the part of the petitioner are arbitrary and same amounts to unfair labour practice adopted by the petitioner. Looking to all the orders of appointment periodically given to the petitioner from time to time on temporary basis, there is no reason or justification given by the petitioner for issuance of such orders. Last order is dated 15th July, 1994. Why service period was extended and for that, no appointment order has been issued which suggests periodical or temporary. Looking to the last order dated 15th July, 1994, services of the respondent workman came to an end on 20th July, 1994. For that, periodical order was not given to the respondent by the petitioner. This being an undisputed position, upto 30th September, 1993, periodical appointment orders were there but beyond that from 1st October, 1993 to 20th July, 1994, no such periodical appointment

orders have been given by the petitioner to the respondent and, therefore, considering the entire period of services including the order dated 15.7.1994, services of the respondent workman were terminated by the petitioner without complying with the provisions of section 25F of the ID Act, 1947. In light of this situation, whether the provisions of section 2(oo)(bb) of the ID Act, 1947 would be applicable or not. Considering the submission of Ms. Desai that such contention was not raised by petitioner before the labour court which is not disputed by learned Advocate Mr. Nanavati for petitioner, therefore, since the labour court was not given an opportunity to examine this contention and to give finding thereon, this court cannot permit the petitioner to raise such contention for the first time before this court as it is a mixed question of law and facts required to be pleaded and proved by the petitioner before the labour court. However, without entering into that aspect, this court has examined the contention. Looking to the facts of this case as emerging from the record, section 2(oo)(bb) of the ID Act, 1947 would not be applicable in this case because there is no fixed term order of appointment issued by the petitioner in favour of the respondent. There is some purpose behind bringing this provisions in

the Statute with effect from 18.8.1984. In **Executive Engineer, District Panchayat, Bharuch versus Shankarbhai Jivabhai Patel reported in 2006 Lab IC page 2180**, this aspect has been considered by this court in detail. Relevant observations made by the **Madras High Court in case of Manager (P&A) Oil and Natural Gas Corporation Ltd. Chennai v. G. Radhakrishnan (200) Lab IC 2570** have also been considered by this court in the said decision by referring to para 22 of the said decision. Scope of sec.2(oo)(bb) has been considered and it has also been considered how the employer is abusing such provision unscrupulously while employing the workman and in such circumstances, court should see the real position so as to rule out the injustice to workman. Decision of the Division Bench of Madras High Court has been considered by this court in the above referred decision of this court in case of Executive Engineer, District Panchayat, Bharuch versus Shankarbhai Jivabhai Patel reported in 2006 Lab IC page 2180. Therefore, relevant observations made by this court in case of Executive Engineer, District Panchayat,Bharuch (supra) in para 8,9,10,and 11 are reproduced as under:

> “8. Relying upon the decision of Apex Court in General Manager, Haryana Roadways (supra) it is submitted that in case termination is found to be bad or illegal,

workman is not entitled automatically for full backwages or any wages, but before granting wages, certain relevant factors are to be taken into account by the Labour Court about the length of service, age, family circumstances and condition of establishment. He submitted that as per the decisions of Apex Court, periodical appointments are outside the scope of Section 2(oo) of the Act, means, it is not retrenchment. However, the facts in each case are different in comparison to the facts of the present case. Recently, the Division Bench of Madras High Court in *The Manager (P&A), Oil and Natural Gas Corporation Ltd., Chennai v. G.Radhakrishnan* (2005 Lab.I.C. 2570) has considered the scope of Section 2(oo)(bb) and also considered that how unscrupulous employer abuse such provision while employing the workmen, and that in such circumstances, the court should see the real position so as to rule out injustice to the workmen. The Division Bench of Madras High Court in above decision considered certain decisions of Apex Court and various High Courts and thereafter held in paragraph-22 that:

> *"22. The above referred to decisions on interpretation of Section 2(oo)(bb) explain the legal position to the effect that a claim of an employer on a term based employee providing for automatic termination whether within the terms fixed or on expiry of the said term, cannot be taken for granted to sustain the order of termination. On a plain reading of Section 2(oo)(bb), it is quite clear that such term based employment would fall outside the scope of `retrenchment' so long as the requirement of such fixed period of employment was bona fide required by the employer. It was therefore, repeatedly pointed*

out that such excepted categories required a rigorous test rather than accepting the plea of employer on its face value or otherwise it would cause serious prejudice to an employee, who can be taken for a ride by unscrupulous employers by contending that the term of employment was for specific period though as a matter of fact such period of employment lasted quite for a long spell. In other words even though the requirement of employment was perennial by adopting the methodology of employing a person for a specific period as many a times, an unscrupulous employer can always resort to abusing the provision contained in Section 2(oo)(bb) to thwart the other statutory protection available to an employee under Section 2(oo), namely, in the case of a `retrenchment' vis-a-vis the consequential benefits contained under Section 25-F of the Industrial Disputes Act. Therefore, when such extraordinary circumstances are brought out in the matter of employment and termination is resorted to by taking umbrage under Section 2(oo)(bb) of the Industrial Disputes Act, in the interest of justice, we are of the view that a close scrutiny of the real position will have to be necessarily made to rule out the possibility of any injustice being caused to an employee. It cannot be lost sight of that Section 2(oo)(bb) is specifically meant to cover only such employment which would be needed for an employer for a specific period alone and beyond which the requirement will not be there and even on such occasions, the employer should not be put into an unnecessary predicament of facing the other consequences that would normally occur while resorting to retrenchment. The benefit of the said

exception will have to be strictly restricted to such specific situations alone and the same cannot be allowed to be misused or abused by the employers even in regard to cases where the nature and requirement of employment is perennial."

See :

(1) S.M.Nilajkar v. Telecom District Manager, Karnataka, 2003 Lab IC 2273 : AIR 2003 SC 3553 : 2003 AIR SCW 2196 : 2003 AIR Kant HCR 1193.

(2) Dpty. Director of Health Services, Nashik v. Latabai Rajdhar Paturkar, 1996 Lab IC 428 : (1996)3 Lab LN 675 (Bom)

(3) Madhya Pradesh Bank Karmachari Sangh (MP) v. Syndicate Bank 1996 Lab IC 1161 (MP)

(4) Alexander Yesudas Maikel v. Perfect Oil Seals and IRP, 1995(1) Lab LN 1165 : 1995 Lab LR 777 (Bom)

(5) M.Venugopal v. LIC of India, AP AIR 1994 SC 1343 : 1994 AIR SCW 778 : 1994(1) Lab LJ 597

(6) Chairman-cum-Managing Director, Orissa Road Transport Co. Ltd. v. Ramesh Chandra Gouda, 1994 Lab IC (NOC) 387 : 1994(2) Lab LJ 1127 (Orissa)

(7) Chakradhar Tripathy v. State of Orissa 1992 Lab IC 1813 (Orissa)

(8) Shailendra Nath Shukla v. Vice-Chancellar, Allahabad University, 1987 Lab IC 1607.

9. Termination of service of casual workmen on daily wages will not fall within the exception contained in sub-clause (bb) of S.2(oo) of the Act, because the "contract of employment" is referable to the contract other than engagement of casual workers on daily wages. `Non-renewal of the contract of employment' presupposes an existing contract of

employment which is not renewed. Even in respect of a daily-wager a contract of employment may exist, such contract being from day to day. The position however, would be different when such a contract is in reality camouflage for a more sustaining nature of arrangement, but the mode of daily-wager is adopted so as to avoid the rigors of the Act. This clause does not contemplate to cover a contract such as of a daily-wager and is rather intended to cover more general class of contracts where a regular contract of employment is entered into and the termination of the service is because of non-renewal of the contract. This interpretation of sub-clause (bb) is in consonance with the substantive provision of clause (oo) of S.2 defining `retrenchment' as termination of service of a workman for any reason whatsoever (See: Chairman-cum-Managing Director Orissa Road Transport Co. Ltd. v. Ramesh Chandra Gouda, [1994] II LLJ 1127 (1128-29) (Ori.) (D.B.), per Rath, J.). Likewise termination of service of a `badli' workman in terms of the contract of employment will not be retrenchment in view of this provision. (Shankariah v. K.S.R.T.C., [1986] I LLJ 195 (196) (Kant.), per Rama Jois, J.)

10. In S. Gobindaraju v. K.S.R.T.C. ([1986] II LLJ 351 (SC), per K.N.Singh, J. the case was decided on another short point viz., the workman was entitled to succeed as the termination order was violative of the principles of natural justice, the Supreme Court did not consider it necessary to decide the point that if the termination of service of a workman by non-renewal of the term of contract of employment or under a stipulation contained in the contract of employment in that behalf will not amount to `retrenchment' in view of the

provisions of sub-clause 2(bb), it would enable unscrupulous employers always to provide a fixed term or stipulation in the contract of service for terminating the employment of employees to escape the rigor of S.25F or S.25N of the Act. And it would further confer arbitrary powers on the employer which would be destructive of the protection guaranteed by the Act to the employees. But various High Courts, using interpretative techniques have mellowed down the rigor of the bare reading of the statute. In Shailendra Nath Shukla v. Vice Chancellor, Allahabad University ([1987] Lab.I.C. 1607 (All.) (D.B.), per Sahai, J.; Chairman-cum-Managing Director Orissa Road Transport Co. Ltd. v. Ramesh Chandra Gouda, [1994] II LLJ 1127 (1128-29) (Ori.) (D.B.), per Rath, J.; Jaybharat Printers & Publishers Pvt. Ltd. v. Labour Court Kozhikode, [1994] II LLJ 373 (Ker.), per Shamsuddin, J.; Bhikku Ram v. Presiding Officer Industrial Tribunal-cum-Labour Court, Rohtak, [1995] Lab.I.C. 2448 (2458-60) (Punj. & Har.) (D.B.), per Singhvi, J. In the facts and circumstances of the case, the termination was held not to be bona fide.; Nathu Ram Saini v. Hindustan Copper Ltd., [1995] I LLJ 421 (424) (Raj.), per Singhvi J.; Ramkishan v. Samrat Ashok Technical Institute, Vidisha, [1995] I LLJ 944 (999) (M.P.), per Dwivedi, J.; Alexander Yesudas Maikel v. Perfect Oil Seals and I.R.P., [1996] I LLJ 533 (535-36) (Bom.), per Srikrishna, J.; Vadodara Municipal Corporation v. Gajendra R.Dhumal, [1996] I LLJ 206 (208-9) (Guj.), per Balia, J.), a Division Bench of the Allahabad High Court observed that sub-clause (bb) is in the nature of an exception to S.2(oo) and has to be construed strictly and in favour of the workmen, as the entire object of the Act is to secure a just and fair deal to them, while adjudicating the termination of

service of a workman for non-renewal of the contract of employment on expiry of the time stipulated in the contract of employment. The nature of employment must be judged by the nature of duties performed by the workman and not on the basis of the letter issued by the employer. S.2(oo)(bb) cannot be extended to cases where the job continues and the employee's work is also satisfactory but periodical renewals are made to avoid regular status to the workmen, as it would be `unfair labour practice'. If contractual employment is resorted to as a mechanism to frustrate the claim of the employee to become regular or permanent against a job which continues or the nature of duties is such that the colour of contractual agreement is given to take it out from S.2(oo), then such agreement cannot be regarded as fair or bona fide. In this case, since the workmen had been working for nearly five years continuously and their jobs were not seasonal, casual or of a daily worker and their duties were like that of a regular employee, the termination of their services on expiry of the stipulated period in the agreement or non-renewal of contract of employment did not come under sub-clause 2(oo)(bb) and amounted to `retrenchment'. A similar view has been taken by a single Judge of a Bombay High Court in Dilip Hanumantrao Shirke v. Zilla Parishad, Yavatmal ([1990] Lab.I.C. 100 (103) (Bom.), per Patel, J., holding that the mere fact that the contract of employment provided termination of by efflux of time, would not by itself be sufficient to take such terminations out of the scope of the definition of `retrenchment'. The adjudicator has to address himself to the question as to whether the period of employment was stipulated in the contract of employment as a device to escape the applicability of the definition of

`retrenchment'. Likewise, a single Judge of the Punjab & Haryana High Court in Balbir Singh v. Kurukshetra Central Co-op. Bank Ltd. ([1990] LLJ 443 (445) (Punj. & Har.), per Amarjeet Chaudhary, J. See also: Chairman-cum-managing Director Orissa Road Transport Co. Ltd. v. Ramesh Chandra Gauda, [1994] II LLJ 1127 (1128-29) (Ori.) (D.B.), per Rath, J.) has pointed out that this clause being in the nature of an exception cannot be given meaning which will nullify or curtail the ambit of the principle clause, because it is not intended to be an outlet to unscrupulous employers to shunt out workmen in the garb of non-renewal of the contract even if the work subsists. The clause, therefore, has to be construed strictly in favour of the workman as far as possible. This provision cannot be resorted to, to frustrate the claim of the employee against uncalled for retrenchment or for denying other benefits. In other words, it is not to be so interpreted as to enable an employer to resort to the policy of `hire and fire' and give unguided power to him to renew or not to renew the contract irrespective of the circumstances in which it was entered into or the nature and extent of work for which he was employed. It has to be interpreted to limit it to the case where the work itself has been accomplished and the agreement of hiring for a specific period was genuine. If the work continues, the non-renewal of the contract has to be dubbed as mala fide.

11. In Madhya Pradesh Bank Karamchari Sangh v. Syndicate Bank [(1996) Lab. I.C. 1161 (1165-66) (M.P.), Per Doabia, J.] on a review of the law laid down by the Supreme Court and by various High Courts, a single Judge of the Madhya Pradesh High Court has stated the following principles of interpretation and application of the

provisions of this clause --

"(i) that the provisions of Section 2(oo)(bb) are to be construed benevolently in favour of the workmen;

(ii) that if the workman is allowed to continue in service by making periodic appointments from time to time, then it can be said that the case would not fall under section 2(oo)(bb);

(iii) that the provisions of S.2(oo)(bb) are not to be interpreted in the manner which may stifle the main provision;

(iv) that if the workman continues in service, the non-renewal of the contract can be deemed as mala fide and it may amount to be a fraud on statute;

(v) that there would be wrong presumption of non applicability of section 2(oo)(bb) where the work is of continuous nature and there is nothing on record that the work for which a workman has been appointed had come to an end".

In Alexander *Yesudas Maikel v. Perfect Oil Seals and IRP & Ors.* [1996(1) LLJ 533], the Bombay High Court held in paragraph-5 that:

> *".....In any event, one cannot lose sight of the fact that clause (bb) has itself been restrictively interpreted and the judicial consensus appears to be that, if the post cannot be said to operate as a charter for unscrupulous employers to jettison their workmen. (See in this connection Dilip Hanumantrao Shirke & Ors. v. Zilla Parishad, Yavatmal & Ors. (1990-I-LLJ-445) (Bom), State Bank of India v. N.Sundaramoney (1976-I-LLJ-478) (SC), S.S.Sambre v. Chief Reg. Manager Central Bank of India, Nagpur & Anr. (1992-I-LLJ-684 Bom), and K.Rajendran v. Dir.(Per.)*

Project & Equipment Corporation of India Ltd. New Delhi & Anr. 1992 I CLR 462." [See : State of Gujarat and Kiritbhai Somabhai Bariya reported in 2006-II-LLJ pg. 1079].

10. Recently, Madras High Court has also considered section 25B and to interpret beneficiary legislation or welfare legislation in case of **Management, Malaysian Airlines Chennai versus Presiding Officer, Principal Labour Court, Chennai and another (2007) 5 MLJ 1300.** Ratio decidendi as decided by the Madras High Court in the aforesaid decision is as under:

> "I. 'The word 'preceding' has been used in section 25B of the Industrial Disputes Act as incorporated in the year 1964. The concept of 'preceding' was introduced in the Industrial Disputes Act so as to give complete and meaningful benefit of welfare legislation to the working class.
> II. "only because of the action of the Management the workman was terminated without any order and he was stopped from service without being paid compensation either. The conduct of the Management amounted to victimization. "
> III."The approach to be borne in mind while interpreting the welfare legislation is illustrated in Surendra Kumar Verma's case where the Supreme Court observed that semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions."

11. In **Haryana State Electronics Development Corporation Ltd. v. Mamni reported in AIR 2006 SC 2427**, the apex court has considered the provisions of section 2(oo)(bb). Observations made by the apex court in para 7 to 11 are reproduced as under:

> “7. Mr. Ranvir Singh Yadav, learned counsel appearing for the respondent, on the other hand, urged that the respondent having completed 240 days of service within a period of twelve months preceding the date of her termination and in view of the fact that no compensation had been paid as provided in section 25F of the Industrial Disputes Act; the Labour Court and consequently the High Court has rightly directed her reinstatement with full back wages.
> 8. Section 2 (oo) (bb) of the Industrial Disputes Act reads as under:-
> “termination of the service of the workman as a result of the non removal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.”
> 9. The respondent was appointed from time to time. Her Services used to be terminated on the expiry of 89 days on regular basis. However, it is noticed that she used to be appointed after a gap of one or two days upon completion of each term. Such an action on the part of the Appellant cannot be said to be bona fide. The High Court rejected the contention raised on behalf of the appellant herein stating:
>
> > '..... It is not possible for us to accept the aforesaid plea raised at the hands of the management on account of the fact that the factual

> position, which has not been disputed, reveals that the respondent workman was repeatedly engaged on 89 days basis. It is, therefore, clear that the intention of the management was not to engage the respondent workman for a specified period, as alleged,but was to defeat the rights available to him under Section 25-F of the Act. The aforesaid practice at the hands of the petitioner – management to employ the workman repeatedly after a notional break, clearly falls within the ambit and scope of unfair labour practice. '

10. A finding of fact was arrived at that her services were terminated on regular basis but she was re-appointed after a gap of one or two days. In that view of the matter, the Labour Court or the High Court cannot be said to have committed any illegality.

11. In this case the services of the respondent had been terminated on a regular basis and she had been re-appointed after a gap of one or two days. Such a course of action was adopted by the Appellant with a view to def eat the object of the A ct. Section 2(oo) (bb) of the Industrial Disputes Act, 1947, therefore, it is not attracted in the instant case.“

12. In Union of India and others versus Ramchander and Another (2007) 1 SCC (L&S) 439, section 25F of the ID Act, 1947 was considered by the apex court. Observations made by the apex court in para 4 of said decision are reproduced as under:

> “4. The respondents were appointed against casual labourers but nevertheless they continued in service

> for four spells and that too their reappointments were made immediately within a few days of termination on completion of 89 days. It shows that sufficient work was available with the employer and had there been no termination on completion of 89 days, they would have completed 240 days of continuous employment. In that view of the matter, the appellants had violated Section 25G of the Industrial Disputes Act. We do not find any error or illegality in the decision rendered by the Division Bench. "

13. Therefore, considering the above referred decision of this court wherein this court has considered various decisions of the apex court as well as other High Courts including the Division Bench of Madras High Court as well as the above referred recent decision of the Madras High Court in case of **Management, Malaysian Airlines Chennai versus Presiding Officer, Principal Labour Court, Chennai and another (2007) 5 MLJ 1300,** and also considering the facts of the case before hand which are not much in dispute between the parties and also considering that the contention of sec. 2(oo)(bb) of the ID Act, 1947 was not raised by the petitioner before the labour court but it has been raised by the petitioner before this court for the first time, this court cannot entertain such contention as it has been raised before this court for the first time. However, without entering into such technicality, this court has examined the issue in light of the

undisputed facts of the case before hand and examined whether sec. 2(oo)(bb) of the ID Act, 1947 would apply to this case or not. According to my opinion, sec. 2(oo)(bb) would apply when employer is able to justify the issuance of periodical appointment on the basis of facts and circumstances which could demand such kind of appointment, otherwise, it would mean that the employer is resorting to such provision only with a view to abuse the provision for getting benefit by creating disadvantageous situation for the workman and also to disentitle him or defeat his rights and protection available under the mandatory provisions of the ID Act, 1947. Therefore, if the employer is unable to justify issuance of such periodical or temporary orders of appointment or the orders of fixed term appointment confined for a particular project, then, same would not attract the provisions of section 2(oo)(bb) of the ID Act, 1947. Similarly, labour court has also rightly observed having contradictory stand of petitioner from the very beginning and subsequent extension vide Exh. 49 and 50 which is suggesting that there is some ulterior motive or intention to take benefit or chance so that the workman may not be able to get justice from the labour court. I have considered the decisions referred to and relied upon by the learned Advocate Mr. HJ Nanavati. In the said decisions, there was justification for issuance of such kind of

periodical orders of appointment on temporary basis or for fixed term and in light of such situation, the apex court has considered that the provisions of section 2(oo)(bb) of the ID Act, 1947 are applicable whereas in this case, the petitioner management has not been able to justify it before this court and not raised such contention before the labour court but raised before this court for the first time. It is necessary to consider one important aspect which is not in dispute that the respondent workman was appointed against the clear vacancy. That can be inferred from Exh.48, letter dated 22nd September, 1993 in favour of Mr. BB Patel who was appointed as Site Engineer at Bavla Point. Even the written statement also suggests the same avermetns as earlier Mr. BB Patel whose services were terminated while working as supervisor was directed to be reinstated, therefore, Mr.BB Patel was appointed from 23.9.1993 and therefore, services of the respondent were not extended and in view of that also, it is covered by 'retrenchment'. Meaning thereby, the post in which the respondent was working was vacant and clear post and on that post respondent remained in service continuously from 1991 to 1994 and in between, there was not a break of even a day and therefore, same is satisfying the requirement of section 25(B) of the ID Act, 1947. As per the opinion of this court, periodical appointment orders which were

> issued by petitioner and placed on the record by learned Advocate Mr. HJ Nanavati is nothing but mere paper arrangement made by the petitioner for defeating the rights and claim of the workman available under the ID Act, 1947 and, therefore, according to my opinion, decisions referred to and relied upon by Mr. HJ Nanavati are not applicable to the facts of the present case. Labour Court has rightly examined the issue and has rightly adjudicated the matter on the basis of the record before it and has rightly granted the reinstatement in favour of the workman.

20. In view of above observations made by this Court on identical issue which has been recently examined by this Court, where, periodical orders were issued by the Gujarat Agro Industries Corporation (supra), Labour Court has decided otherwise and come to conclusion that it amounts to retrenchment. This Court has confirmed the award passed by Labour Court. Therefore, according to my opinion, the contentions raised by learned advocate Ms. Mandavia that termination of both the workmen is not covered by retrenchment definition, but, it covered by exception which cannot be accepted and same are rejected.

21. The Labour Court has rightly considered the question of backwages by not granting the full backwages, because, from the year 1987 to 2007, about 20 years have been passed not due to fault on the

part of workmen, but, matter remained pending before the Labour Court from the year 1989 to 2003-04 for no fault of either party and thereafter, the petition is filed by petitioner in one case after three years and in another case, after four years. Meanwhile, the award passed by Labour Court is not implemented by petitioner and workmen is remained without work and without service and without wages though workmen are having the award in their favour enforceable more than 3 or 4 years and petitioner being a State Authority without any fear and having daring not to implement the award passed by Labour Court in favour of respondents and either of respondent is not reinstated by the petitioner though more than 3/4 years have been passed from the date of publication of award in question. The Labour Court has rightly examined the issue of gainful employment and granted only 15% backwages, because, petitioner being a State Authority and time consuming for deciding the reference. According to my opinion that being a reasonable amount which has been decided and granted by the Labour Court, for that, Labour Court has not committed any error which requires interference by this Court. The finding given by Labour Court that such kind of appointment is not bonafide appointments and there is no purpose to engage respondents for particular period only and then on each occasions, extended the period, therefore, Labour Court has come to the conclusion that such kind of termination is amounts to retrenchment and Section 25F is not followed by the petitioner. Therefore, order of

termination is bad and whatever the break is given in each occasions between two period as artificial break, that conclusion has rightly arrived at by Labour Court. For that, Labour Court has not committed any error which requires interference by this Court under Article 227 of the Constitution of India.

22. Therefore, according to my opinion, the Labour Court has perfectly appreciated the oral and documentary evidence and rightly find out the real nature of appointment after considering the evidence from both the sides, for that, Labour Court has not committed any error which requires any interference by this Court under Article 227 of the Constitution of India.

23. This Court cannot exercise the power of judicial review just to find out the fault in the award. The purpose of industrial adjudication is to encourage the industrial peace to be maintained by both the parties. This Court cannot pick the hole of the award while exercising the judicial power under Article 227 of the Constitution of India as per the view taken by Delhi High Court has considered this aspect in case of ***Sushila Sharma v. Pawan Sharma*** reported in ***2007-II-LLJ (Delhi) 865***. The relevant Para 11 and 12 are quoted as under :

> *"11. The settled position of law in respect of interference by the*

writ courts under Article 226 of the Constitution of India in matters of this nature is that a writ court exercises its powers of judicial review well within certain parameters. A series of judgments have been rendered by the Supreme Court in this context, as mentioned below:

(i) Sadhu Ram Vs. Delhi Transport Corporation AIR 1984 SC 1967.
(ii) Harbans Lal Vs. Jag Mohan, , (1985) 4 SCC 333.
(iii) Calcutta Port Shramik Union Vs. Calcutta River Transport Association and Ors. 1988 (supp.) SCC 768.
(iv) Ramniklal N.Butta and another Vs.State of Maharashtra and others, (1997) 1 SCC 134.
(v) Indian Overseas Bank Vs. I.O.B.Staff Canteen Workers' Union and Anr. AIR 2000 SC 1508.
(vi) Master Marine Services (P) Ltd. Vs. Metcalfe and Hodgkinson (P) Ltd. and Anr., (2005) 6 SCC 138.

12. All the above judgments, if read collectively, clearly indicate that the High Courts should not interfere with the awards of the Industrial Tribunal or the Labour Court on mere technicalities. Interference is permissible only if the order of the Subordinate Court suffers from an error of jurisdiction, breach of principles of natural justice or is vitiated by a manifest or

apparent error of law. Reappraisal of evidence without sufficient reason in law to arrive at a finding of fact contrary to those arrived at by the Subordinate Court is not the intent of exercising judicial review. It is only in cases where overwhelming public interest requires interference and cases of the nature where there is an error of jurisdiction or law as referred to hereinabove, should the court interfere, particularly in view of the fact that the object of enacting Industrial Disputes Act and of making a provision therein to refer disputes to tribunals for settlement, is to bring about industrial peace and in all such cases, an attempt should be made by the courts in exercise of their powers of judicial review, to sustain as far as possible, the awards made by the Industrial Tribunals and Labour Courts, instead of picking holes in the awards on rival points and frustrating the entire adjudication process.“

24. Hence, there is no substance in the present petitions. Accordingly, present petitions are dismissed.

Sd/-

[H.K. RATHOD, J.]

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